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IN THE UNITED STATES SUPREME COURT
OCTOBER TERM, 1982

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NO.

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THOMAS E. FORTNER, Petitioner

v.

UNITED STATES OF AMERICA

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# PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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## QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court erred in failing to grant a Motion for Judgment of Acquittal at the conclusion of the government's case in chief, at the conclusion of the defendant's case, and again at the conclusion of government's rebuttal?

2. Whether the Court erred in allowing the government to adduce testimony and make references to pleas of guilty by alleged co-conspirators?

## TABLE OF CONTENTS


| | Page |
|---|---|
| Opinion Below | 1 |
| Jurisdiction | 1 |
| Statement of the Case | 2 |
| Argument | 7 |
| Conclusion | 21 |


## TABLE OF AUTHORITIES


| Cases: | Page |
|---|---|
| Fitts v. U.S., 284 F 2d 108 | 14 |
| Hightover v. U.S., 325 F 2d 616 | 11 |
| Isaac v. U.S., 284 F 2d 168 | 12 |
| McKenzie v. U.S., 266 F 2d 524 | 11 |
| U.S. v. Bingaman, 240 F Supp 186 | 13 |
| U.S. v. Brawner, 471 F 2d 969 | 8, 12 |
| U.S. v. Chandler, 393 F 2d 920 | 9 |
| U.S. v. Gross, 375 F Supp 971 | 13 |
| U.S. v. Gullo, 502 F 2d 759 | 17 |
| U.S. v. Harrell, 436 F 2d 606 | 17 |

Cases - continued Page

U.S. v. Heath, 260 F 2d 623 (CA Hawaii 1958) . . . . 8

U.S. v. Hudson, 566 F 2d 889 . . . . . 9

U.S. v. Shafer, 384 F Supp 496 . . . . 13

U.S. v. Sisson, 399 U.S. 267 . . . . . 7

Williams v. U.S., 312 F 2d 862 . . . . . 13

TREATISE:

8 Moore's Federal Practice, §11.02 . . . 16

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## OPINION BELOW

The complete unpublished opinion of the United States Court of Appeals for the Fourth Circuit is printed in Appendix A hereto.

## JURISDICTION

Petitioner seeks review of a judgment of the United States Court of Appeals for the Fourth Circuit, which affirmed his conviction on fourteen counts of an indictment

charging him with violations of Title 18 U.S.C. sections 371, 1341, 1342 and 1954. The judgment of the Fourth Circuit was entered on September 21, 1982. The jurisdiction of this Court is invoked pursuant to Title 28 U.S.C. section 1254(1).

## STATEMENT OF THE CASE

### A. Nature of Case, Course of Proceedings and Disposition in Court Below

On the 29th day of July, 1980, the defendants Thomas E. Fortner and Rebecca Fortner were indicted for multiple violations of Title 18, United States Code, Sections 371, 1341, 1342 and 1954, all relating to a conspiracy to bribe certain officials of the United Mine Workers of America, to defraud the United Mine Workers of America Health and Retirement Fund, and related charges. At a trial commencing on November 3, 1980, before the Honorable Charles Haden, II, the

defendant Thomas E. Fortner was convicted of Fourteen (14) of the Fifteen (15) counts in said indictment, and defendant Rebecca Fortner was convicted of one (1) count of said indictment. Following the denial of post-trial motions, the defendant Thomas E. Fortner was sentenced to serve Three (3) years and to pay a fine in the amount of Twenty Thousand Dollars ($20,000.00) and the defendant Rebecca Fortner was sentenced to a term of six (6) months, which sentencing took place on the 15th day of December, 1981.

## B. Statement of Facts

The indictment in the within case alleges that from the spring of 1977 until December of 1978, defendant Thomas E. Fortner and Rebecca Fortner conspired with others to defraud the United Mine Workers of America Health and Retirement Fund by over-billing said Fund for medical services performed

for beneficiaries of the United Mine Workers of America Health and Retirement Fund. During the times set forth in said indictment, the defendant Thomas E. Fortner was a medical doctor and licensed physician engaged in the general practice of medicine in and around the Town of Logan, Logan County, West Virginia, and was a doctor who provided services to the beneficiaries of the United Mine Workers Health and Retirement Funds. The defendant Rebecca Fortner was and is the wife of defendant Thomas E. Fortner, and assisted Doctor Fortner in the operation of the medical practice which the defendant maintained as aforesaid. It is further alleged in the indictment that to effect the conspiracy in which Doctor Fortner is alleged to have particiapted, he provided payments to certain employees of the United Mine Workers Health and Retirement Funds in the amount of approximately Twenty-five Thousand One

Hundred Dollars ($25,100.00), and that said employees of the United Mine Workers Health and Retirement Funds would, in exchange therefor, aid and assist Doctor Fortner in defrauding the Funds.

The thrust of the conspiracy alleged is that Doctor Fortner submitted to the United Mine Workers Health and Retirement Fund bills for services to beneficiaries of said Funds which had not been provided to said beneficiaries, and that these bills were sent by regular United States Mail to the United Mine Workers Health and Retirement Fund in Washington, D.C.

It is further alleged that as a result of the misrepresentation the defendant Thomas Fortner received certain sums of money from the United Mine Workers Health and Retirement Funds to which he was not, in fact, entitled.

It is further alleged that in order to

conceal the conspiracy and overt acts as alleged, defendants Thomas E. Fortner and Rebecca Fortner did conspire and make false representations to certain beneficiaries of the Fund, all during the time period as aforesaid.

At the trial of the within defendants upon the indictment as aforesaid on November 3-7, and 10-13, 1980, defendant Thomas Fortner by and through a number of expert medical witnesses, set forth a defense of insanity to the charges in said indictment. It is the position of the defendant that due to the expert testimony as to the mental condition and capacity during the time of the alleged offenses that the Court erred in not granting the defendants' Motion for Judgment of Acquittal at the conclusion of the defendants' evidence and again at the conclusion of the government's rebuttal evidence.

## ARGUMENT

### I.

The Trial Court erred in failing to grant defendants' Motion of Judgment of Acquittal at the conclusion of the government's case in chief, at the conclusion of the defendants' case, and again at the conclusion of the government's rebuttal.

Rule 29, Federal Rules of Criminal Procedure, provides for the entry of a judgment of acquittal whenever the evidence is insufficient to sustain a conviction of the offense or offenses before the Court. Judges, like juries, can acquit defendants. U.S. v. Sisson, 399 U.S. 267 (1970). The purpose of such action by the Court is to prevent possible prejudice upon the trial of a criminal case, and trial judges have wide discretion in their methods of control, among which is an order to the jury to return a

verdict of acquittal. U.S. v Heath, (C.A. Hawaii 1958) 260 F 2d 623. In the instant case, it is submitted that the Court erred in DENYING defendant Thomas E. Fortner's Motion for Judgment of Acquittal in the following respects: the evidence adduced by defendant on the issue of insanity was so clear and would admit of no other conclusion than the consistent insanity of the defendant during the time period alleged in the indictment.

The test of insanity in the instant case is that as set forth in U.S. v Brawner, wherein the Court held that in order for a defendant to be exculpated from guilt by reason of conduct which results from mental disease or defect, the accused must be lacking in substantial capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law at the time of such conduct. U.S. v Brawner,

471 F 2d 969. see also: U.S. v Chandler, 393 F 2d 920. In the instant case, the record is replete with the expert testimony of defense psychiatrists that Doctor Thomas Fortner did have a mental disease and lacked the substantial capacity to appreciate the wrongfulness of his conduct to the requirements of the law of the time of such conduct. (Witness McNeer: TR, 646. Witness Weaver: TR, 823, Witness Carter: TR, 986).

In addition, although the government, is not required to bring on its own expert witness to rebut such testimony, U.S. v Hudson, 566 F 2d 889 (1977), a psychiatrist testified on behalf of the government as to the sanity of Doctor Thomas Fortner. In the cross-examination of Doctor Charles Weise, the psychiatrist who testified on behalf of the government, the following exchange took place:

***

Q Doctor, can you tell me whether or not Thomas Fortner on the 13th day of June 1977 was capable of conforming his conduct to the requirements of the law?

A I don't know whether he was nor not.

Q What about August the 7th?

A I don't know whether he was or not.

Q What about September the 16, 1977?

A I don't know whether he was or not on that day.

Q On October the 12th?

A I don't know.

Q November the 30th?

A I don't know.

Q And you don't know for any individual day or even part of a day during either 1977 or 1978, do you?

A I can't say with a reasonable degree of certainty for any different time or day.

***

While admittedly the granting of a judgment of acquittal in an insanity case is an exceptional remedy, there is authority for such a procedure. It has been held that there must be a serious mental disease, and satisfactory evidence of causation, before a verdict of acquittal by reason of insanity must follow as a matter of law. Hightover v U.S. 325 F 2d 616 (1963). In the federal courts, the rule is that a defendant charged with a specific crime is entitled to an acquittal if, from all the evidence, he was not capable in law of committing a crime. McKenzie v U.S., 266 F 2d 524 (1959). Therefore, to determine if the Court erred in failing to grant defendant's Motion for a Judgment of Acquittal, we must determine if defendant Fortner was capable in law of committing a crime, or in other words was the defendant Fortner lacking in substantial

capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law at the time of such conduct. U.S. v Brawner, 471, F 2d 969 (1972). It is submitted that the direct testimony of Doctors McNeer, Weaver and Carter, and of government witness Weise, is so abundantly clear on this issue that the trial court erred in failing to grant defendant's Motion for Judgment of Acquittal. It is further submitted that as a result of the testimony of the four psychiatrists, the psychiatric evidence was such that a reasonable mind must necessarily have had a reasonable doubt as to the sanity of the accused, and therefore defendant Thomas Fortner was entitled to acquittal by reason of insanity. Issac v. U.S., 284 F 2d 168 (1960). The main defense on behalf of the defendant was that he lacked the capacity to conform his conduct to the requirements of the law, and

it is submitted that where the evidence on such issue is so clear, the court should, in the exercise of its judicial function and discretion, grant the defendant's Motion for Judgment of Acquittal. U.S. v Shafer, 384 F Supp 496 (D.C. Ohio, 1974); U.S. v. Gross, 375 F Supp. 971 (D.C. N.J. 1974); U.S. v Bingaman, 240 F Supp 186 (D.C. D.C. 1965). It has also been held that when insanity was an issue and evidence as a matter of law failed to establish beyond a reasonable doubt that offenses charged were not the product of a mental disease of mental defect, the defendant was entitled to a directed verdict of acquittal by reason of inanity. Williams v U.S., 312 F 2d 862, cert. denied 83 S CT. 1894, 374 U.S. 841 (1962). In Fitts v U.S., the Circuit Court held that the sufficiency of evidence to dissipate the presumption of sanity and raise the issue of insanity is a question of law for the Court to decide in

the first instance, and if the government offers no evidence of sanity, there is no factual issue for the jury and defendant is entitled to a directed verdict of acquittal. Fitts v. U.S., 284 F 2d 108 (C.A. Colo. (1960). It is submitted that in the instant case the testimony of the defense psychiatrists fairly raised the issue of insanity and clearly proved the defendant to be insane at the time of the alleged offenses, and testimony of the government's psychiatrist merely bolstered the testimony of the defense psychiatrists. Accordingly, as a matter of law, no real dispute existed upon this issue, and the Court should have granted the Motion for Judgment of Acquittal as a matter of law.

II.

The Court erred by allowing the government to adduce testimony and make reference

to pleas of guilty by alleged co-conspirators.

In the instant case, the defendants Thomas Fortner and Rebecca Fortner were indicted along with one Andrew J. Martin, Jr., and which said Andrew Martin entered into a plea bargain agreement and entered a plea of guilty before trial. The entry of Martin's guilty plea and his status with respect to the defendants was brought before the jury in the early stages of trial (TR, page 135), and the following took place:

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Q Pursuant to paragraph 1 of this agreement, Mr. Martin, did you enter a plea of guilty to a federal criminal charge:

A Yes I did.

Q And what was that criminal charge?

A Conspiracy to commit mail fraud.

Q Conspiracy with who?

A Several different people.

Q Who were they?

A Doctor Craft, Doctor Fortner.

Q I'm talking about the guilty plea you entered?

A On the guilty plea with Doctor Fortner.

Q And anyone else?

Who is named in the indictment?

A Becky Fortner.

***

It is well settled that the government may, on direct examination, elicit testimony from its witnesses as to guilty pleas to prevent the defense from creating a misleading impression, or the jurors from thinking, that the government is seeking to keep something from the jury. 8 Moore's Federal Practice, Criminal Rules, §11.02 [2], citing U.S. v Cook (CA 5th 1972) 461 F 2d 906; Isaac v. U.S., (CA 9th 1970) 431 F 2d 11.

However, the admission of evidence of a co-defendant's guilty plea should be scrutinized more closely, and the criteria for reversal applied more liberally, where the indictment charges a conspiracy. 8 Moore's Federal Practice, Criminal Rules. In reviewing such a practice, the Fifth Circuit held in U.S. v Harrell, that the "guilty plea to a conspiracy charge carries with it more potential harm to the defendant on trial because the crime by definition requires the participation of another. The jury could not fail to appreciate the significance of this and would realize ... that it takes two to tango." U.S. v Harrell, (CA 5th 1969) 436 F 2d 606, at 614; U.S. v. Gullo, (CA 3rd 1974) 502 F 2d 759, at 761. In the instant case a cautionary instruction was given to the jury as to the purpose for which such testimony was elicited, but it is respectfully submitted that such instruction does little or nothing

to offset the inference of guilt received by the jury from such testimony. One must inquire as to the legitimate evidentiary purpose of such testimony, and then weigh its probative value against the potential prejudicial impact. To say that the prejudicial effect of the testimony of an indicted co-conspirator, who says that he entered a plea of guilty to the indictment, can be corrected by an instruction to the jury is a legal fiction at best. In U.S. v. Harrell, cited above, the Court said that the "legitimate presumption is that the evidentiary purpose was the general one of demonstrating the defendant's guilt of the offenses for which he was on trial... "U.S. v. Harrell, supra, at 614. In Harrell, the Court went to say that "the evidentiary purpose ordinarily to be served by proof of a co-defendant's plea of guilty is so shadowy, so insubstantial that it would be the better practice in

run-of-the-mill cases to exclude such proof altogether... "U.S. v Harrell, supra, 617. What did Martin's guilty plea show? That he had nothing to gain? It is submitted that such testimony, to eliminate the inference of some interest in untruthfulness, is hardly sufficient to allow the "guilt by association" circumstance that it creates. It is submitted that Martin could have testified without ever going into such an issue, and if some inquiry were made as to his motives, the government on rebuttal could delve into this issue. On balance, it is submitted that the prejudicial impact of such testimony far outweighs whatever "shadowy" probative value it may have, and cautionary instructions notwithstanding, the Court should not have allowed such testimony.

It is interesting to note that the Assistant U.S. Attorney, in cross-examining

a defense psychiatrist, made the following statement: "...that he and Mrs. Fortner got together with another defendant in this case that has pleaded guilty..." (TR, page 897). The reference to Mr. Martin's plea of guilty had absolutely nothing to do with the question, nor with the witness' testimony, and it is submitted that this is an accurate indication of the government's real purpose in such testimony - the inference of the guilt of Doctor Fortner from Martin's plea of guilty. It is submitted that under such circumstances cautionary instructions (TR page 1389) serve no purpose other than to emphasize the testimony, and in the exercise of sound judicial discretion the Court should have excluded all such reference to Martin's plea of guilty.

For purposes of clarification, it is the position of defendant Rebecca Fortner

that all the foregoing arguments also apply to her, inasmuch as her indictment and conviction are so interrelated with that of defendant Thomas Fortner that they are not legally or practically separable.

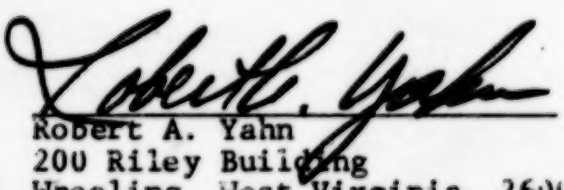
## CONCLUSION

It is respectfully submitted that the evidence in the instant case is abundantly clear that the insanity of defendant Thomas Fortner was established in a manner such as to admit of no other conclusion, and that as a matter of law the trial court should have granted defendant's Motion for Judgment of Acquittal. Although the defense of insanity is generally a factual determination to be made by the jury, it is submitted that in this case the evidence is so clear, even from the government's own witness, that the Court should have removed the case from the consideration of the jury and granted the

defendant's Motion for a Judgment of Acquittal.

In addition, the references by witness Martin, an indicted co-conspirator, to his guilty plea served no other purpose than to create an inference of guilt of defendant Fortner, and cautionary instructions notwithstanding, such inference is so damaging, and so far outweighs any meager probative value it may have, that such testimony should not have been admitted.

THOMAS E. FORTNER
BY COUNSEL



Robert A. Yahn
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Wheeling, West Virginia 26003

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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No. 81-5024

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United States of America, Appellee,

v.

Thomas E. Fortner Appellant.

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Appeal from the United States District Court for the Southern District of West Virginia, at Charleston. Charles H. Haden, II, District Judge.

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Argued August 31, 1982

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Decided September 21, 1982

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Before BUTZNER, Circuit Judge, FIELD, Senior Circuit Judge, and MURNAGHAN, Circuit Judge.

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John R. Mitchell for Appellants; Nancy C. Loar, Assistant United States Attorney (David A. Faber, United States Attorney, Ruth Lynette Ranson, Assistant United States Attorney on brief) for Appellee.

APPENDIX "A"

PER CURIAM:

Dr. Thomas E. Fortner appeals from his conviction of mail fraud, bribery, and conspiracy to commit mail fraud and bribery.[1]

During 1977 and 1978 Fortner, a physician licensed to practice medicine in West Virginia operated with his wife's assistance a private medical practice in Logan, West Virginia. He treated patients who were entitled to medical benefits under the United Mine Workers of America Health and Retirement Funds health benefits program. According to the evidence adduced at trial, the Fortners systematically submitted to the Funds fraudulent bills for medical services that had never been rendered. Although the exact amount of the fraud was never determined, a substantial portion of the $327,364.00 paid by the Funds to Fortner from

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1 Fortner's wife, Rebecca, also appealed. However, prior to oral argument she dismissed her appeal.

May, 1977 through August, 1978 was for fraudulent claims. In addition, Fortner paid fees and kickbacks in excess of $25,000 to employees of the Funds in order to conceal the illegal activity.

The Fortners and Andrew Martins, Jr., an employee of the Funds, were charged in a fifteen count indictment on July 29, 1980.[2] Pursuant to a plea agreement, Martin entered a guilty plea to Count One. At trial, Fortner Attempted to establish his insanity, and Rebecca Fortner sought to show that she had been under duress during the pertinent time period. The jury found Fortner guilty on fourteen counts, and Rebecca Fortner guilty

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2 Count One of the indictment charged all three with conspiracy to commit bribery and mail fraud. 18 U.S.C. §371. Counts Two through Four charged the Fortners with mail fraud. 18 U.S.C. §1341. The remaining counts charged Fortner, individually, with bribery. 18 U.S.C. §1954.

on one count.[3] Fortner now argues on appeal that the district court erred in refusing to grant a motion for judgment of acquittal, and that it was improper for government counsel to make reference to Martins' guilty plea.

I.

Fortner moved for a judgment of acquittal at the conclusion of the government's case-in chief, at the close of the defendants' case, and again after the government's rebuttal. The district court denied all motions. He claims that the evidence on the issue of his sanity was so clear that no jury could reasonably find him sane during the pertinent time period.

A motion for a judgment of acquittal

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3 The jury was unable to reach a verdict on Counts One, Three and Four as to Rebecca Fortner, and Count Fourteen as to Dr. Fortner.

must be denied if "the evidence and inferences therefrom would warrant the jury's finding the defendant guilty beyond a reasonable doubt." United States v. Dominguez, 604 F.2d 304, 310 (4th Cir. 1979), cert. denied, 444 U.S. 1014 (1980), quoting Burks v. United States, 437 U.S. 1, 16 (1978). The Fourth Circuit has adopted the American Law Institute formulation of the insanity defense, which provides:

> A person is not responsible for criminal conduct if at the time of such conduct as a result of a mental disease or defect he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law.

United States v. Chandler, 393 F.2d 920, 926 (4th Cir. 1968) (en banc). Thus the inquiry to be made is whether the evidence, viewed in the light most favorable to the government, would allow a jury to find that Fortner had substantial capacity at the time of the offenses to appreciate the criminality of

his conduct or to conform his conduct to the requirement of law. Jackson v. Virginia, 443 U.S. 307, 319 (1979); Glasser v. United States, 315 U.S. 60, 80 (1942).

Five psychiatrists testified, three for the defense and two for the government. The defense psychiatrists all testified that Fortner was insane during 1977 and 1978,[4] but the government experts reached a different conclusion. Dr. David Walker, who had attended medical school with Fortner and had treated him as an out-patient in 1979, testified that from the spring of 1977 to December, 1978, Fortner had substantial capacity to conform his conduct to the requirements of law, and appreciated the wrongfulness of his conduct. Dr. Charles Weise, the

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4 However, the testimony of Dr. Glen Weaver, one of the defense psychiatrists, was sufficiently incredible that it created some doubt as to all of the evidence

other government psychiatrist, testified that Fortner was legally sane for periods during that time. In addition, patients who frequently saw Fortner testified that he appeared coherent and well able to carry on his medical practice.

It is the jury's role to weigh the evidence and decide questions of credibility. United States v. Tresvant, 677 F.2d 1018, 1021 (4th Cir. 1982); United States v. Fisher, 484 F.2d 868, 869-70 (4th Cir. 1973), cert. denied, 415 U.S. 924 (1974). Here, there was contradictory testimony with respect to Fortner's sanity. The jury was entitled to reject the testimony of the defense psychiatrists and conclude that Fortner was sane.

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4 of insanity. Dr. Weaver testified that Dr. Fortner was insane during the entire period from 1966 through 1978. During that time, however, he successfully completed medical school and his internship and residency, and began his private practice, apparently without violating the law until 1977.

Since there is ample evidence to support that finding, the district court did not err in refusing to enter a judgment of acquittal.

II.

On direct examination of Andrew Martin, Jr., an indicted co-conspirator, the prosecution asked about Martin's guilty plea. Martin testified that he had pleaded guilty to conspiracy to commit mail fraud, and that he had been sentenced before his testimony. Fortner argues that the district court should not have permitted the testimony. Since the defense did not object to Martin's testimony, our inquiry is whether there was plain error which affected substantial rights. Fed. R. Evid. 103(d).

We have previously held that "where the defense plans to impeach witnesses by establishing that their testimony is pursuant to a plea agreement, the government

may introduce this evidence in its case in chief." United States v. Whitehead, 618, F.2d 523, 529 (4th Cir. 1980) (government witnesses permitted to testify on direct examination that they pleaded guilty to the charges at issue in the case). In addition, although the district judge gave no instruction at the time of the testimony, he later charged the jury that an accomplice's guilty plea "is not in and of itself evidence of the guilt of any other person."[5] Finally, the defense counsel made reference to Martin's guilty plea in his opening statement. Cf. United States v. McEachern, 675 F.2d 618, 624 (4th Cir. 1982) ("It ill-becomes defense counsel, after such reference to the plea agreement, to object to its introduction at

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5 Fortner relies on United States v. Harrell, 436 F.2d 606, 617 (5th Cir. 1970). There, however, the trial court failed to give a cautionary instruction.

trial.") We therefore conclude that the inquiry into the guilty plea on direct examination was not error.[6]

Accordingly, the judgment is affirmed.

AFFIRMED.

6 In any event, any error which might have occurred was harmless. The evidence of the fraud was overwhelming, and the fact of Martin's guilty plea had no bearing on the contested issue, Fortner's state of mind. Moreover, Fortner's reliance on the insanity defense implicity conceded that he had committed the fraud. Cf. Harris v. Ballone, No. 81-6863 (4th Cir. June 10, 1982) ("an insanity acquittee has already been shown beyond a reasonable doubt to have committed at least one dangerous act").